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MAR 7 2008

For The Northern Mariana Islands
By _____
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7
8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE NORTHERN MARIANA ISLANDS**

10 **JOHN S. PANGELINAN,**

11 Plaintiff,

12 vs.

13 **DAVID A. WISEMAN, et al.,**

14 Defendants.

15 **ANGELITO TRINIDAD, RONNIE**
16 **PALERMO, HERMAN TEJADA,**
17 **ESPERANZA DAVID, ANTONIO**
18 **ALOVERA , and UNITED**
19 **STATES OF AMERICA,**

20 Respondents.

Case No. CV 08-0004

REPLY OF LILLIAN A.
TENORIO AND ROBERT T.
TORRES TO OPPOSITION
TO RULE 12(b)(6) MOTION
TO DISMISS

Date: April 17, 2008

Time: 9 am

Judge: Tydingco-Gatewood

21 **INTRODUCTION**

22 In one respect, Pangelinan is correct: neither Robert T. Torres nor
23 Lillian A. Tenorio “have any clue of what the *Bivens* action against them is all
about...” Opposition at 2. As attorneys engaged in the private practice of
law in the Commonwealth, their unfortunate connection with Pangelinan
arises out of their representation of Angelito Trinidad, Ronnie Palermo,

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1 Herman Tejada, Esperanza David, and Antonio Alovera (the “Trinidad
2 Plaintiffs”) to enforce a judgment, obtained against Pangelinan and his wife
3 by prior counsel in Civil Action 97-0073 (the “Underlying Judgment”).
4 Pangelinan, however, casts these attorneys as “state actors” who conspired
5 with judges Munson and Wiseman to violate his First Amendment rights and
6 deprive him of his liberty and property without due process of law.

7
8 In his Opposition to the Attorneys’ Motion, Pangelinan details the
9 scheme that Torres and Tenorio allegedly masterminded to deprive him of his
10 constitutional rights. First, Pangelinan charges Torres and Tenorio with
11 initiating a retaliatory criminal prosecution as punishment for his public
12 criticism of the Underlying Judgment. Then, Pangelinan goes on to castigate
13 these attorneys for retaliatory denial of due process in obtaining an order that
14 enjoined him from interfering with the sale of his Papago property at public
15 auction and ousting him from possession. According to Pangelinan, the order
16 deprived him of the opportunity to institute yet *another* action in Superior
17 Court to contest the deed of sale and demonstrate how his claim to the Papago
18 Property was superior to that of Mafnas.

19 As seen through the clouded lens of Pangelinan’s latest vision, this case
20 does not challenge the validity of the sale, the validity of the deed, the method
21 of delivering the deed, nor the Underlying Judgment: this case “is about due
22 process of law right [sic] being denied Pangelinan in the deprivation of his
23

1 property in retaliation for his telling the whole world of not yielding his land
2 to any purchaser 'come typhoon, tsunami, volcanic eruption or the devil
3 himself', etc." Opposition at 7.

4 Notwithstanding his bald allegations now charging the opposite, the
5 Complaint offers no facts to establish that Attorneys Torres and Tenorio
6 qualify as state actors responsible for the perpetration of Pangelinan's alleged
7 constitutional injuries. *See Dennis v. Sparks*, 449 U.S. 24, 28, 101 S. Ct. 183,
8 186, 66 L.Ed.2d 185, (1980) *Pangelinan v. Munson*, 54 F.Appx. 472 (9th Cir.
9 2003). "[M]erely resorting to the courts and being on the winning side of a
10 lawsuit does not make a party a co-conspirator or a joint actor with the judge."
11 *Dennis*, 449 U.S. at 24, 101 S.Ct. at 186. To prove a conspiracy between
12 Pangelinan and any of the Federal defendants, Plaintiff must assert concrete
13 facts evidencing some sort of agreement or meeting of the minds to violate
14 Pangelinan's constitutional rights. *See Lugar v. Edmondson Oil Co., Inc.*, 457
15 U.S. 922, 939, N.21, 102 S.Ct. 2744, 2754-55, 73 L.Ed.2d 482 (1982);
16 *Woodrum v. Woodward County, Okl.*, 866 F.2d 1121, 1126 (9th Cir. 1989).
17 The claims against Torres and Tenorio fail entirely in this respect.
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A. THE CONSTITUTIONAL CLAIMS AGAINST TENORIO AND TORRES FAIL BECAUSE THEY ARE NOT GOVERNMENT ACTORS

There is no private right of action under *Bivens* for damages against private entities acting under color of federal law.^{1/} Accordingly, for a *Bivens* claim to succeed, a plaintiff must allege: (1) that the defendant was acting under color of federal law; and (2) the defendant violated the plaintiff's constitutional rights. *See Hartman v. Moore*, 547 U.S. 250, 256, 126 S.Ct. 1695, 1701, 164 L.Ed.2d 441 (2006); *Morgan v. United States*, 323 F.3d 776, 780 (9th Cir. 2003). Once a Plaintiff establishes that a defendant has acted under federal law, "[t]here are two aspects to the second inquiry: 1) there must have been a deprivation of federally protected rights, privileges or immunities, and 2) the conduct complained of must have been causally connected to the deprivation." *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 559 (1st Cir.1989).

The Complaint against Tenorio and Torres fails on both grounds. The Complaint does not contain any allegations that either Torres or Tenorio were engaged in federal law enforcement activity, were on the government payroll, received federal funding for their work, or were even authorized to perform a

^{1/}*See Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 66, 122 S.Ct. 515, 519, 151 L.Ed.2d 456 (2001); *Meuse v. Pane*, 322 F.Supp.2d 36, 38-39 (D.Mass. 2004) (holding that plaintiff could not sustain a *Bivens* action against broadcast network because "a *Bivens* claim is simply not available against a private entity even if that entity is acting under the color of federal law").

1 government task as government agents or actors. Notwithstanding his four
 2 fingers of the federal hand analogy, which is curious, at best,^{2/} the Complaint
 3 fails to point out how Tenorio or Torres acted *in concert* with any federal
 4 defendant so as to qualify as federal actors on these grounds. (emphasis
 5 added.) Because the thrust of Plaintiff's grievances against Torres and
 6 Tenorio concern only actions taken on behalf of their clients during the course
 7 of a legal proceeding as private counsel, there is no evidence establishing
 8 them as government actors that can be liable for federal constitutional
 9 violations under *Bivens*.^{3/}

11 **B. PLAINTIFF FAILS TO PLEAD THAT HE WAS ENGAGED IN** 12 **PROTECTED CONDUCT**

13 Pangelinan contends that Torres and Tenorio "are private attorneys who
 14 were state actors and who at all relevant times substantially employed and
 15 utilized the aid of, and at times aided, in collusion, combination and
 16 collaboration with the Federal Defendants, one way or another" Under
 17 any standard of pleading, let alone the pleading standard required in the Ninth
 18 Circuit, this conspiracy claim fails.

19 ² See Opposition at 3.

20 ³ See *Mathis v. Pac. Gas & Elec. Co.*, 75 F.3d 498, 503 (9th Cir.1996) (finding
 21 that it was error not to dismiss a *Bivens* claim absent proof that the defendant was an
 22 agent of the federal government); *Lacedra v. Donald W. Wyatt Detention Facility*, 334
 23 F.Supp.2d 114, 137 (D. R.I. 2004) (Dismissal is warranted when plaintiffs did not allege
 that the defendants were federal agents); *Stone v. Baum*, 409 F.Supp.2d 1164, 1176
 (D.Az. 2005) (Plaintiffs may not sue a lawyer in private practice for violations of their
 civil rights because private practice attorneys are not state actors).

1 Notwithstanding the accusations on page five of the Opposition, the
2 Complaint provides no hint as to how Tenorio or Torres were involved in the
3 alleged federal court conspiracy. The only stated explanation of these
4 attorneys' "wrongful conduct" was their use of judicial process to enforce a
5 valid judgment of this court. Second, Plaintiff does not plead specific facts to
6 support the existence of the claimed conspiracy. *Olsen v. Idaho State Bd. Of*
7 *Medicine*, 363 F.3d 916, 929-30 (9th Cir. 2004). Because Pangelinan only
8 asserts on page five that Torres and Tenorio applied for an order enjoining
9 Pangelinan "to abandon his Papago land upon execution and delivery of the
10 deed to state actor Mafnas," (see Objection at 5), moreover, the Complaint
11 still fails on these grounds.
12

13 Finally, to establish a First Amendment retaliation claim in an
14 "ordinary citizen" case – that is, a case that does not involve an employment
15 or contractual relationship between the plaintiff and the government--a
16 plaintiff must show (1) that he engaged in constitutionally protected activity,
17 (2) that the defendant's actions caused "an injury that would chill a person of
18 ordinary firmness from continuing to engage in that activity," and (3) that the
19 actions complained of were "substantially motivated" by the plaintiff's
20 protected activity. *Skoog v. County of Clackamas*, 469 F.3d 1221, 1232 (9th
21 Cir. 2006); *Keenan v. Tejeda*, 290 F.3d 252, 258 (5th Cir.2002). Pangelinan
22 utterly fails in this regard, since there is no constitutional right to threaten
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1 people with harm. There is no constitutional right to avoid paying a
2 judgment. There is no constitutional right to ignore court orders. Moreover,
3 because the Ninth Circuit has ruled that there *was* probable cause to indict
4 Pangelinan on obstruction of a court order for publishing his threatening and
5 intimidating Letter, no claim for retaliatory prosecution can exist. *See*
6 *Hartman*, 547 U.S. at 255-256, 126 S.Ct. at 1704.

7
8 **B. HARTMAN PROVIDES NO HELP TO PLAINTIFF**

9 Although Pangelinan sees an “amazing parallel” between the facts of
10 *Hartman v. Moore* and his retaliatory prosecution claim, the connection exists
11 only in the mind of John Pangelinan. At the close of the Government's case in
12 *Moore*, the District Court concluded that there was a complete lack of direct
13 evidence connecting the defendants to any of the criminal wrongdoing
14 alleged, and it granted the defendants' motion for judgment of acquittal.
15 Following his acquittal, Moore filed a complaint alleging that the prosecutor
16 and the inspectors had engineered his criminal prosecution in retaliation for
17 criticism of the Postal Service, thus violating the First Amendment. Moore
18 also argued, among other things, that the postal inspectors launched a criminal
19 investigation against him well before they had any inkling of any wrongdoing,
20 that the inspectors targeted him for his lobbying activities, and that they
21 pressured the United States Attorney's Office to have him indicted.

22
23 Only in some fantastic world would these facts parallel those leading to

1 the conviction of John Pangelinan. First, a jury found Pangelinan guilty
2 beyond reasonable doubt on two counts of obstruction. Second, the
3 conviction on one of those counts was affirmed on appeal. Since there was
4 probable cause to indict Pangelinan and convict him of the criminal charge,
5 *Hartman* provides no relief to this plaintiff.

6 Further, Pangelinan's claim that he was deprived of due process,
7 because he had no opportunity to contest the judicial sale and show his claim
8 to the Property was superior, is equally ridiculous. Pangelinan was provided
9 with process at every stage of the collection and enforcement proceedings to
10 pay the judgment. He was provided with ample notice of the sale. Every
11 procedure required under Commonwealth law was followed. He also had
12 ample opportunity to hire a lawyer to intervene on his behalf or file an action
13 (and we know he has no trouble doing just that) to enjoin the sale and allege,
14 once again in Superior Court, that the judgment was void. He elected not to
15 pay the judgment, substitute other property, or enjoin the sale. His claim of
16 due process deprivation is thus too little, and way late.

18 **C. TORRES AND TENORIO ARE ENTITLED TO SANCTIONS**

19 In *Pangelinan v. Munson*, 54 F.Appx 472 (9th Cir. 2003), the Ninth
20 Circuit warned Pangelinan that because a private attorney representing the
21 Trinidad Plaintiffs in Civil Action 97-00073, was not a state actor, he could
22 not be sued for constitutional violations. In bringing this lawsuit against
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1 Torres and Tenorio, Pangelinan once again filed a lawsuit founded on
2 arguments that have been previously litigated and rejected.

3 As a result of his choice to continue with his meritless challenges to the
4 Underlying Judgment, Mr. Torres and Ms. Tenorio have been forced to incur
5 expenses and other costs to respond. Under these circumstances and even
6 against pro se litigants, sanctions are warranted. *See* 120 Fed.Appx. 742,
7 2005 WL 332757 (9th Cir. Feb. 11, 2005); *Stone v. Baum*, 409 F.Supp.2d
8 1164 (D. Ariz. 2005).

10 CONCLUSION

11 Without a shred of evidence establishing Tenorio and Torres as state
12 actors, John Pangelinan has filed a complaint against them for vague and
13 amorphous constitutional violations in utter disregard of applicable law. For
14 the foregoing reasons, therefore, all claims against Lillian A. Tenorio and
15 Robert T. Torres should be dismissed with prejudice. To put an end to
16 Pangelinan's harassment and to compensate these attorneys for the bad faith
17 filing of what can only be characterized as a frivolous and groundless lawsuit,
18 sanctions in the form of costs and fees should be imposed by the Court.

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20 Respectfully submitted this 7th day of March, 2008.
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